Supreme Court, U.S.
FILED

No. 02 402 SEP 9 2002

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In The

Supreme Court of the United States

STATE OF OKLAHOMA DEPARTMENT
OF CORRECTIONS,

Petitioner,

v.

CHARLES K. STEWART,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the EEOC impermissibly waive the Eleventh Amendment protections secured for the State of Oklahoma?

2. Is equitable waiver of the statutory requirement that a right to sue letter relating to a State be issued by the United States Attorney General contrary to Eleventh Amendment jurisprudence?

LIST OF PARTIES

The parties to this proceeding on *Petition for Writ of Certiorari* are:

Petitioner:

State of Oklahoma Department of Corrections

(Defendant in the District Court and Appellant in the United States Court of Appeals for the Tenth Circuit);

Respondent:

Charles K. Stewart (Plaintiff in the District Court and Appellee in the United States Court of Appeals for the Tenth Circuit).

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PETITION FOR A WRIT OF CERTIORARI

The State of Oklahoma Department of Corrections respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

CITATIONS OF OPINIONS BELOW

The opinion of the district court is unreported, see Appendix 8.

The opinion of the Court of Appeals is reported at 292 F.3d 1257 (10th Cir. 2002), see Appendix 1.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit affirmed the district court and Judgment was entered on June 12, 2002.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Amendment XI, Constitution of the United States:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. §2000e-5(f): See Appendix 14.

29 C.F.R. §1601.28: See Appendix 18.

STATEMENT OF THE CASE

1. Plaintiff was and still is, an employee of the State of Oklahoma Department of Corrections.

2. Plaintiff invoked the jurisdiction of the trial court pursuant to 28 U.S.C. §1331. Plaintiff sought relief in the form of damages pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000 *et seq.* for alleged discrimination based on race, African American.

3. The Defendant State of Oklahoma Department of Corrections filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In the Motion, the Defendant asserted (1) its Eleventh Amendment immunity from suit since, given the undisputed facts, the United States Attorney General [USAG] had refused to issue a statutorily required "Right to Sue" letter. The stated basis of the refusal by the USAG was that an EEOC regulation, 29 C.F.R. §1601.28(d), no longer required the USAG to issue such a letter. Oklahoma also asserted that (2) the letter from the USAG was a jurisdictional prerequisite to suit.

4. The United States District Court for the Northern District of Oklahoma, the Honorable Terry C. Kern, denied the Defendant's Motion for Summary Judgment. The court denied the Eleventh Amendment issue without discussing the immunity claim. See, Appendix 3 and 6. The court further held that the failure to obtain a right to sue letter was a condition precedent and subject to waiver. See, Appendix 11-13.

5. As to the Eleventh Amendment claim, the Tenth Circuit Court of Appeals determined that the trial court had implicitly overruled the Eleventh Amendment immunity claim, then affirmed the district court. See, Appendix at 6.

6. The Court of Appeals for the Tenth Circuit declined to exercise jurisdiction over the "failure to obtain a right to sue letter from the Attorney General" claim. See, Appendix 6-7.

7. The incidents giving rise to Plaintiff's claim for relief occurred while the Plaintiff was assigned as a Deputy Warden at the Jess Dunn Correctional Center. (Amended Complaint at 3).

8. In November 1997, Plaintiff was reassigned to the Dick Connor Correctional Center as an Administrative Assistant but retained the same salary he had as a Deputy Warden. (Deposition of Plaintiff at pages 10, 34-35; Deposition of Ron Champion at pages 8-9; and Deposition of James Saffle at page 8).

9. Plaintiff filed his Charge of Discrimination with the Equal Employment Opportunity Commission [EEOC] on July 31, 1998. On February 2, 2000, he was issued a "Right to Sue" letter by the EEOC. (Exhibits 101 and 102 to the *Plaintiff's Response to the Defendants' Motion for Summary Judgment.*)

10. In response to Defendant's Motion to Dismiss, Plaintiff's counsel contacted the U.S. Department of Justice to obtain a "Right to Sue" letter from the USAG. (Exhibits 104 and 105 to the *Plaintiff's Response to the Defendants' Motion for Summary Judgment.*)

11. By letter from the USAG dated October 11, 2000, Plaintiff was informed that pursuant to 29 C.F.R. §1601.28(d), the USAG is not able to send such a

letter. (Exhibit 106 to the *Plaintiff's Response to the Defendants' Motion for Summary Judgment.*)

12. Plaintiff elected to stand on his EEOC "Right to Sue" letter.

REASONS FOR GRANTING THE PETITION

Issue 1:

The EEOC has impermissibly waived the Eleventh Amendment protections afforded to the State of Oklahoma. The EEOC has adopted 29 C.F.R. §1601.28(d) which is contrary to both the clear unambiguous language of Congress and the Constitution. This rule effectively waives the Eleventh Amendment protections of the State of Oklahoma. Since there has been no express waiver by Congress nor an unequivocal waiver by the State of Oklahoma, this regulation by an administrative agency impermissibly waives the Eleventh Amendment.

The Eleventh Amendment guarantees that nonconsenting states may not be sued by private individuals in federal court unless Congress unequivocally intends to abrogate that immunity and acts pursuant to a valid grant of authority. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 364 (2001). There are limited exceptions. For example, there may be an effective waiver of the Eleventh Amendment by Congress only if Congress is acting under legitimate authority and the waiver language is clear. *Id.* at 364. However, there is no such exception related to the actions of an administrative agency.

This Court has held that in the 1972 amendments to Title VII, Congress effectively waived Eleventh Amendment sovereign immunity, thereby subjecting the states to Title VII liability. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 and 457 (1976). The position of the State of Oklahoma is that the **EEOC**, by adoption of its regulation, (1) has amended the "Title VII" which was considered in *Fitzpatrick*, and (2) the EEOC does not have any legitimate authority to waive Oklahoma's Eleventh Amendment immunity.

Title VII, 42 U.S.C. §2000e-5(f)(1) is unambiguous in the requirement that a right to sue letter **must** come from the United States Attorney General only in cases against the government prior to bringing a civil lawsuit. The relevant language is:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Attorney General has not filed a case . . . **the Attorney General** in a case involving a government, governmental agency, or political subdivision, **shall** so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought . . . . (Emphasis added)

When Title VII was originally adopted in 1964, states and other governmental agencies were not subject to Title VII. In 1972, Congress considered amendments to Title VII to specifically include governmental employers. In amending Title VII, Congress subjected the States to

Title VII liability and directed that investigations and suits against governmental agencies were to be referred to and investigated by the United States Attorney General, *not* the EEOC, a federal administrative agency. Included in this enforcement scheme is that a "right to sue" letter against a state or governmental agency shall be issued by the United States Attorney General. It was in this form, and only in this form, that this Court found there to be an effective waiver of Eleventh Amendment immunity. *See*, *Fitzpatrick v. Bitzer*, *supra*.

The Plaintiff, the USAG and the courts below rely on an **EEOC REGULATION** which permits the EEOC to issue the right to sue letter in cases where the EEOC has dismissed the charge. This regulation is in direct conflict with 42 U.S.C. §2000e-5(f)(1). When an agency regulation conflicts with the clear unambiguous intent of Congress, the language of the statute prevails. *See, Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) ("We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate."); *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). In this case, the mandatory statutory language is unambiguous that an investigation must be conducted by and the right to sue letter must come from the United States Attorney General. Contrary interpretations and regulations by the EEOC must give way to the intent of Congress. *Chevron*, *supra*. If the EEOC is permitted to vary the express terms of the statute as it relates to

states, then the EEOC has changed the conditions under which this Court decided *Fitzpatrick*. The Oklahoma Department of Corrections asserts that an administrative agency does not have the authority to waive the Eleventh Amendment, and any attempt to exercise such authority is an ineffective waiver of Oklahoma's Eleventh Amendment immunity.

Issue 2:

The Plaintiff elected to stand on his EEOC "right-to-sue" letter which he received from the EEOC. The trial court denied the State of Oklahoma's Rule 56 motion for judgment. The trial court held that the receipt of a "right to sue" letter from the USAG is not jurisdictional and may therefore be equitably waived. The court of appeals declined to entertain jurisdiction on this issue, thus implicitly holding that the right to sue letter is a condition precedent.

Before this Court's decision in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the timely filing of charges of employment discrimination with the EEOC and receiving and acting upon the statutory notice of the right to sue were "jurisdictional prerequisites." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). In *Zipes*, this Court held that the timely filing of the charge was a condition precedent in the nature of a statute of limitations and thereby subject to equitable waiver, estoppel or tolling. *Zipes*, 455 U.S. at 393. After *Zipes*, the Courts of Appeals expanded *Zipes* to read that receipt of

the statutory right to sue letter is also a condition precedent subject to equitable waiver.[1] These decisions conflict with this Court's holding in *Zipes*. Further, the fallacy of such an extension of *Zipes* is that it was not a case involving a state government. However, the courts are now applying this expanded reading of *Zipes* to actions against a state as an employer. These cases also conflict with this Court's holding in *Federal Maritime Comm. v. South Carolina State Ports Authority*, __ U.S. __, 122 S.Ct. 1864 (2002).

The same argument and reasoning contained above in the discussion of Issue 1, relating to the plain language of the statute, is applicable here. The Eleventh Amendment is not subject to waiver by a federal agency or by the courts. Characterizing the requirement for the receipt of and acting on a right to sue letter as a condition precedent impermissibly disregards the plain

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[1] *See, Gooding v. Warner-Lambert* Co., 744 F.2d 354 (3rd Cir. 1984) (condition precedent); *Pinkard v. Pullman-Standard*, 678 F.2d 1211 (5th Cir. 1982) (condition precedent); *Portis v. State of Ohio*, 141 F.3d 632 (6th Cir. 1998) (condition precedent); *Jones v. American State Bank*, 857 F.2d 494 (8th Cir. 1988) (condition precedent); *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647 (9th Cir. 1989) (condition precedent); and *Fouche v. Jekyll Island-State Park Authority*, 713 F.2d 1518 (11th Cir. 1983) (condition precedent). The Fourth, Seventh and Tenth Circuits appear to have controlling decisions both ways. *See*, Fourth Circuit cases of *Perdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091 (4th Cir. 1982) (condition precedent) and *Davis v. North Carolina Dept. of Correction*, 48 F.3d 134 (4th Cir. 1995) (jurisdictional); Seventh Circuit cases of *Bullard v. Sercon Corp.*, 846 F.2d 463 (7th Cir. 1988) (condition precedent) and *Perkins v. Silverstein*, 939 F.2d 463 (7th Cir. 1991) (jurisdictional); and the Tenth Circuit in this case at 292 F.3d 1257 (10th Cir. 2002) as well as *Jones v. Runyon*, 91 F.3d 1398 (10th Cir. 1996) (jurisdictional). No controlling precedent could be found for the First, Second or District of Columbia Circuits.

language of the statute and the Eleventh Amendment.

The Plaintiff admits that he has not received a letter from the USAG; thus, the trial court does not have jurisdiction and should have so ruled. As the Plaintiff has decided to stand on his case as is, the Defendant State of Oklahoma is entitled to judgment.

CONCLUSION

It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

* * * [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980).

This Court should grant certiorari to review the Tenth Circuit's decision; hold that the EEOC has impermissibly waived the Eleventh Amendment; hold that the receipt of a right to sue letter from the United States Attorney General is a jurisdictional requirement to proceed against

a State; and grant judgment on behalf of the State of Oklahoma Department of Corrections.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CHARLES K. STEWART,

Plaintiff-Appellee,

v.

STATE OF OKLAHOMA,

Defendant-Appellant,

and

JAMES SAFFLE, in his official capacity as director of the Department of Corrections,

Defendant.

No. 01-5131

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (D.C. No. 00-CV-344-K)

(Filed Jun. 12, 2002)

Submitted on the briefs:

Thomas L. Bright, Tulsa, Oklahoma, for Plaintiff-Appellee.

Charles K. Babb, Assistant Attorney General, Oklahoma City, Oklahoma, for Defendant-Appellant.

Before **SEYMOUR, McKAY**, and **MURPHY**, Circuit Judges.

McKAY, Circuit Judge.

The State of Oklahoma, as employer, appeals from a denial of its Motion for Summary Judgment in this employment discrimination case.[1] Oklahoma asserts that a particular federal regulation, enacted by the Equal Employment Opportunity Commission, and upon which the plaintiff relied to satisfy his administrative exhaustion duties, violates both Title VII of the 1964 Civil Rights Act and the Eleventh Amendment. Because Oklahoma's Eleventh Amendment immunity is not threatened or eroded, we lack appellate jurisdiction over the merits of Oklahoma's exhaustion claim.

I.

Plaintiff Stewart is an African-American employee of the Oklahoma Department of Corrections. Stewart filed a charge of discrimination with the EEOC alleging that prison officials demoted and reassigned him because of his race. The EEOC dismissed the charge and issued Stewart a right-to-sue letter. Stewart subsequently sued the State of Oklahoma alleging it violated Title VII.

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

The State moved to dismiss the suit claiming, among other things, that Stewart's right-to-sue letter was invalid because it came from the EEOC rather than the United States Attorney General. Oklahoma argued that Stewart had not exhausted his administrative remedies, relying on 42 U.S.C. § 2000e-5(f)(1) which Oklahoma argues requires the Attorney General to issue right-to-sue letters whenever the employer is a government agency.

Faced with the State's motion, Stewart asked the Attorney General to issue him a right-to-sue letter. The Attorney General declined, citing a work-share agreement codified in the Code of Federal Regulations, that places the duty on the EEOC to issue letters in cases where "there has been a dismissal of a charge." *See* Aplt. App. at 116, citing 29 C.F.R. § 1601.28(d).

The district court denied the State's motion to dismiss. The State then moved for summary judgment, renewing its claim that Stewart's failure to secure a right-to-sue letter from the Attorney General violated the plain language of Title VII. The State bolstered its argument by invoking its Eleventh Amendment immunity. The State asserted that when Congress abrogated the states' Eleventh Amendment immunity as part of the 1972 Amendments to Title VII, it did so on the premise that a suit against a state employer could proceed only if the plaintiff secured a right-to-sue letter from the Attorney General. Consequently, the work-share agreement between EEOC and the Attorney General was unconstitutional.

The district court denied the motion for summary judgment without discussing the immunity claim. The court stated that it would be unfair to dismiss Stewart's

suit in view of the Attorney General's refusal to issue him a right-to-sue letter. The State now appeals.

II.

Our jurisdiction generally extends only to final orders from the district courts. 28 U.S.C. § 1291. A denial of summary judgment is not a final order within the meaning [sic] § 1291. *Walter v. Morton,* 33 F.3d 1240, 1242 (10th Cir. 1994). However, there are exceptions to the final order rule, including one for appeals arising under the "collateral order" doctrine. *See Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1949) (collateral order exception triggered by an assertion of right conclusively decided by a lower court and "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated"). The Supreme Court has held that the rejection of an Eleventh Amendment immunity claim is an immediately appealable ruling under the collateral order exception. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144-45 (1993).

Because Oklahoma has invoked the collateral order exception, we have jurisdiction over this interlocutory appeal to consider the State's Eleventh Amendment claim.

III.

The State does not challenge the validity of Title VII's abrogation provision. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 452 (1976) (when Congress amended Title VII, it clearly authorized suits against states). Oklahoma's challenge focuses on the work-share agreement reflected in 29 C.F.R. § 1601.28(d). The State asserts that Title VII contains a

clear statutory mandate that the Attorney General, not the EEOC, issue right-to-sue letters in cases where a state agency is the employer. 42 U.S.C. § 2000e-5(f)(1). This directive was included with the abrogation provision as part of the 1972 Amendments to Title VII. Oklahoma argues that the subsequent federal regulation promulgated by the EEOC allowing it the ability to issue right-to-sue letters conflicts with the statute's express intent that the Attorney General be empowered with the sole right to issue right-to-sue letters. Thus, the federal regulation is invalid and Title VII's abrogation provision is contingent on a plaintiff's ability to produce a right-to-sue letter from the Attorney General.

We reject this argument. We are not convinced that when Congress amended Title VII it hitched the abrogation of the states' immunity to a requirement that the Attorney General issue aggrieved employees right-to-sue letters. The text of Title VII takes no position on the source of a plaintiff's right-to-sue letter; indeed it does not even refer to the requirement that a plaintiff obtain such a letter. *See* 42 U.S.C. § 2000e(a). Furthermore, when the Supreme Court ruled that Title VII properly abrogated the states' immunity, the Court never predicated its holding on the Attorney General issuing right-to-sue letters. *See Fitzpatrick*, 427 U.S. 445.

Similarly, the statute that purportedly directs the Attorney General to issue right-to-sue letters, 42 U.S.C. § 2000e-5(f)(1), contains no express or implied connection to the abrogation provision. The legislative history of Title VII is also silent with respect to any nexus between the abrogation provision and the issuance of right-to-sue letters. Neither Congress nor the courts have ever

indicated that these two components of Title VII form any sort of partnership.

As we stated above, the district court did not address Oklahoma's immunity defense in its order denying summary judgment. It chose instead to focus on the merits of the underlying exhaustion claim. We construe the district court's silence as a rejection of Oklahoma's Eleventh Amendment defense and an implicit refusal to grant summary judgment on immunity grounds. Because we do not accept the State's argument, we affirm the district court's implicit ruling denying Eleventh Amendment immunity to Oklahoma.

IV.

We next address Oklahoma's exhaustion claim. Oklahoma urges us to interpret the plain language of Title VII, specifically 42 U.S.C. § 2000e-5(f)(1), as clearly proscribing Stewart's reliance on a right-to-sue letter issued by the EEOC. The State requests that we reach this issue by exercising pendent appellate jurisdiction.

Simply because this court has jurisdiction over the State's immunity claim does not mean we have jurisdiction to review all other aspects of the district court's order denying summary judgment. The Supreme Court has directed appellate courts to exercise pendent jurisdiction in interlocutory appeals sparingly over matters that are not themselves immediately appealable. *Swint v. Chambers County Comm'n,* 514 U.S. 35, 49 (1995) (extending to civil cases the general rule, rooted in criminal law, that pendent claims are appealable "if, and only if, they too fall within *Cohen's* collateral-order exception to the final-judgment rule"). This court will exercise pendent appellate

jurisdiction "where the otherwise nonappealable decision is inextricably intertwined with the appealable decision, or where review is necessary to ensure meaningful review of the appealable one." *Timpanogos Tribe v. Conway,* 286 F.3d 1195, 1200 (10th Cir. 2002) (quotation omitted).

The State's claim is neither: (1) independently subject to the collateral order doctrine nor (2) inextricably intertwined with one that is. While issues of immunity fall within the collateral order doctrine, Oklahoma's failure-to-exhaust claim does not by itself trigger the doctrine. The merit of Oklahoma's exhaustion claim rests on less urgent questions of statutory interpretation and equitable considerations effectively reviewable after final judgment, without causing irreparable damage to a vital state interest. Furthermore, the State's immunity claim is easily separated from its exhaustion claim.

V.

We AFFIRM the district court's refusal to grant Eleventh Amendment immunity to Oklahoma. Because we lack appellate jurisdiction over all other aspects of the court's ruling, we may not review them at this time.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES K. STEWART,	)	
	)	
Plaintiff,	)	
	)	**Case No.**
v.	)	**00-CV-344-K (E)**
	)	
JAMES SAFFLE, in his official capacity as director of the Department of Corrections, and the STATE OF OKLAHOMA,	)	
	)	
Defendants.	)	

ORDER

(Filed Jul. 6, 2001)

Before the Court is the motion of Defendants for summary judgment (#22). Plaintiff alleges that he was an employee of the Department of Corrections and was discriminated against on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981, 1983, and 2000e, *et. seq.*

Plaintiff is an African-American who served as Deputy Warden of the Jess Dunn Correctional Facility in Taft, Oklahoma until he was moved to another facility in December of 1997. The transfer resulted in the loss of Plaintiff's "Deputy Warden" title but his pay level remained the same. He alleges that this employment action was essentially a demotion and that it was racially motivated. Defendants claim that the transfer was the result of the Plaintiff's unprofessional conduct – specifically, that

he did not control his temper and had mistreated employees. Defendants do not dispute that Plaintiff's transfer was an adverse employment decision.

A motion for summary judgment is properly granted where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *See* Rule 56(c) Fed. R. Civ. P. In applying this standard, the Court views the record in the light most favorable to the non-moving party. *See Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998). However, where the non-moving party will bear the burden of proof at trial on a dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment. *Sorenson v. University of Utah Hospital*, 194 F.3d 1084, 1086 (10th Cir. 1999).

When a plaintiff asserts that he was discriminated against on the basis of race, he may use either direct or indirect evidence of discrimination to prove his allegations. *See Amro v. Boeing Co.*, 232 F.3d 790, 796 (10th Cir. 2000). In this case, there is a dispute about whether a statement made by Defendant constitutes direct evidence of discrimination. Other than that, Plaintiff does not offer any direct evidence of discrimination.

Thus, the framework for evaluating circumstantial evidence under either § 1981 or Title VII is that set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnel Douglas*, the plaintiff "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." *McDonnell Douglas*, 411 U.S. at 802. The second stage of

analysis requires Defendants to provide a legitimate, non-discriminatory reason for Plaintiff's discharge. *See id.* The third stage shifts the burden back to the Plaintiff and he must show that the Defendants' proffered reasons are mere pretext. *See Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *McDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1121 (10th Cir. 1991) (the court "must still make a judgment as to whether the evidence, interpreted favorably to the plaintiff, could persuade a reasonable jury that the employer had discriminated against the plaintiff"). The Plaintiff bears the ultimate burden of showing that he was the victim of intentional discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000).

Defendants relieve Plaintiff of the first burden for purposes of their summary judgment motion. They do not contest that Plaintiff can establish a prima facie case. Therefore, the Court need not discuss the prima facie elements as they might apply to this case. As stated earlier, Defendants' proffered reason is that Plaintiff's conduct was unprofessional. Plaintiff avers in his Response that two of his subordinates lodged numerous complaints against him. These complaints are baseless according to Plaintiff, yet they form at least a portion of the reason given by Defendants for Plaintiff's transfer.

In an attempt to show that Defendants' proffered reason is pretextual, Plaintiff argues that the true reason for his demotion is that Defendant Saffle wanted to change the racial composition of the three-member administrative staff on which Plaintiff served. To wit, Plaintiff claims that Saffle told Plaintiff's immediate supervisor, Warden Rita Maxwell, that she needed to staff her two deputy-warden

positions with two Caucasians. *See* Plaintiff's Response at 15. Prior to Plaintiff's transfer, Mrs. Maxwell's deputies were both African-American males. In her deposition, she states that Defendant Saffle suggested that she replace those individuals with a white female and a white male deputy. *See* Maxwell Depo. at 77. Defendants do not deny that Saffle made this suggestion. They simply point out that it "is not as offensive as other types of statements which the Tenth Circuit has found not to be direct evidence" and that it does not qualify as direct evidence because it is a personal opinion. *See E.E.O.C. v. Wiltel, Inc.*, 81 F.3d 1508, 1514 (10th Cir. 1996).

Whether the statement is offensive is irrelevant to the present inquiry. It is likewise irrelevant whether the statement qualifies as direct evidence. The fact that Defendant Saffle made the statement and was a key figure in the decision to transfer Plaintiff serves to discredit Defendant's proffered legitimate non-discriminatory reason for the adverse employment action. Given this evidence, the Court is not inclined to prevent a jury from deciding whether Plaintiff's race played a role in Defendant Saffle's decision to transfer, or demote, Plaintiff. This evidence, if interpreted favorably to the Plaintiff, may persuade a reasonable jury that Defendants discriminated against Plaintiff on the basis of his race. *See McDonald*, 941 F.2d at 1121.

Defendants also claim that Plaintiff has failed to comply with Title VII because he did not secure a "Right-to-Sue" letter from the U.S. Attorney General (USAG). Under 42 U.S.C. § 2000e-5(f)(1), a grievance must be filed with the USAG when a governmental entity is a party and if the USAG does not wish to pursue the action, the USAG must notify the aggrieved party that it may proceed with a

civil action on its own behalf. Plaintiff states that despite his good-faith attempt, he was unable to obtain a Right-to-Sue notice.

Plaintiff received a Right-to-Sue Notice from the Equal Employment Opportunity Commission (EEOC) and then endeavored to obtain one from the USAG. In response, the Department of Justice enigmatically stated that where the EEOC has issued a Right-to-Sue Notice (as they did in this case), then the USAG need not issue one. *See* Letter from USAG to Plaintiff's Counsel, Plaintiff's Exh. 106. As Plaintiff states, he has attempted to obtain the proper Notice from the USAG, but has failed because of an apparent conflict between the USAG and the EEOC. Although the proper Right-to-Sue Notice is required before a plaintiff can file suit in a Federal District Court, the Court agrees with Plaintiff's counsel that this odd outcome of his bona fide attempt should not preclude him from proceeding.

In a situation virtually identical to the one at hand, the court in *Fouche v. Jekyll Island-State Park Authority*, 713 F.2d 1518, 1526 (11th Cir. 1983) found that a plaintiff's failed attempt to obtain a Right-to-Sue Notice from the USAG under § 2000e-5 does not preclude a federal district court from exercising jurisdiction. The Eleventh Circuit stated, after plaintiff "diligently attempted to obtain the required notice . . . to dismiss her Title VII claim for failure to receive the proper notice when she is unable to obtain it would obviously be unfair to [plaintiff]." *Id.* The Eleventh Circuit concluded that the plaintiff's diligent attempt permitted waiver of the requirement. The Tenth Circuit affirmed an opinion issued in the Western District of Oklahoma which likewise involved a situation analogous to the one at bar. *See Thames v. Oklahoma*

Historical Soc'y, 646 F.Supp. 13, 16 (W.D.Okla. 1985), *aff'd per curiam*, 809 F.2d 699 (10th Cir. 1987). In *Thames*, the district court held that a right to sue notice is not jurisdictional, but is required and "precludes [the] action in the absence of waiver, estoppel or equitable tolling." *Id.* In the instant case, the Court finds that the requirement can be waived because Plaintiff made a diligent attempt to secure a right to sue letter from the USAG.

Under the foregoing circumstances, the Court finds that the Plaintiff has provided sufficient argument and evidence to establish that there may be a genuine issue of material fact for trial. IT IS THEREFORE ORDERED that the motion of the defendants for summary judgment (# 22) is hereby DENIED.

ORDERED THIS 5 DAY OF July, 2001.

/s/ Terry C. Kern
TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

42 U.S.C. §2000e-5(f):

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the commission, the commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under

subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary

to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in

such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trail within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

§ 1601.28 Notice of right to sue: Procedure and authority.

(a) Issuance of notice of right to sue upon request.

(1) When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued and the charge to which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission shall promptly issue such notice as described in § 1601.28(e) to all parties, at any time after the expiration of one hundred eighty (180) days from the date of filing of the charge with the Commission, or in the case of a Commissioner charge 180 days after the filing of the charge or 180 days after the expiration of any period of reference under section 706(d) of Title VII as appropriate.

(2) When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued, and the charge to which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission may issue such notice as described in § 1601.28(e) with copies to all parties, at any time prior to the expiration of 180 days from the date of filing the charge with the Commission; provided, that the District Director, the Area Director, the Local Director, the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Field Management Programs, Office of Program Operations has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect.

(3) Issuance of a notice of right to sue shall terminate further proceeding of any charge not a Commissioner charge unless the District Director; Area Director; Local Director; Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Field Management Programs, Office of Program Operations; or the General Counsel, determines at that time or at a later time that it would effectuate the purpose of title VII or the ADA to further process the charge. Issuance of a notice of right to sue shall not terminate the processing of a Commissioner charge.

(4) The issuance of a notice of right to sue does not preclude the Commission from offering such assistance to a person issued such notice as the Commission deems necessary or appropriate.

(b) Issuance of notice of right to sue following Commission disposition of charge.

(1) Where the Commission has found reasonable cause to believe that title VII or the ADA has been violated, has been unable to obtain voluntary compliance with title VII or the ADA, and where the Commission has decided not to bring a civil action against the respondent, it will issue a notice of right to sue on the charge as described in § 1601.28(e) to:

(i) The person claiming to be aggrieved, or,

(ii) In the case of a Commissioner charge, to any member of the class who is named in the charge, identified by the Commissioner in a third-party certificate, or otherwise identified by the Commission as a member of the class and provide a copy thereof to all parties.

(2) Where the Commission has entered into a conciliation agreement to which the person claiming to be aggrieved is not a party, the Commission shall issue a notice of right to sue on the charge to the person claiming to be aggrieved.

(3) Where the Commission has dismissed a charge pursuant to § 1601.18, it shall issue a notice of right to sue as described in § 1601.28(e) to:

(i) The person claiming to be aggrieved, or,

(ii) In the case of a Commissioner charge, to any member of the class who is named in the charge, identified by the Commissioner in a third-party certificate, or otherwise identified by the Commission as a member of the class, and provide a copy thereof to all parties.

(4) The issuance of a notice of right to sue does not preclude the Commission from offering such assistance to a person issued such notice as the Commission deems necessary or appropriate.

(c) The Commission hereby delegates authority to District Directors, Area Directors, Local Directors, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Field Management Programs, Office of Program Operations, or their designees, to issue notices of right to sue, in accordance with this section, on behalf of the Commission. Where a charge has been filed on behalf of a person claiming to be aggrieved, the notice of right to sue

shall be issued in the name of the person or organization who filed the charge.[1]

(d) Notices of right-of-sue for charges against Governmental respondents. In all cases where the respondent is a government, governmental agency, or a political subdivision, the Commission will issue the notice of right to sue when there has been a dismissal of a charge. The notice of right to sue will be issued in accordance with § 1601.28(e). In all other cases where the respondent is a government, governmental agency, or political subdivision, the Attorney General will issue the notice of right to sue, including the following cases:

(1) When there has been a finding of reasonable cause by the Commission, there has been a failure of conciliation, and the Attorney General has decided not to file a civil action; and

(2) Where a charging party has requested a notice of right to sue pursuant to § 1601.28(a)(1) or (2). In cases where a charge of discrimination results in a finding of cause in part and no cause in part, the case will be treated as a "cause" determination and will be referred to the Attorney General.

(e) Content of notice of right to sue. The notice of right to sue shall include:

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[1] Formal Ratification-Notice is hereby given that the EEOC at a Commission meeting on March 12, 1974, formally ratified the acts of the District Directors of EEOC District Offices in issuing notices of right to sue pursuant to Commission practice instituted on October 15, 1969, and continued through March 18, 1974. 39 FR 10178 (March 18, 1974).

(1) Authorization to the aggrieved person to bring a civil action under title VII or the ADA pursuant to section 706(f)(1) of title VII or section 107 of the ADA within 90 days from receipt of such authorization;

(2) Advice concerning the institution of such civil action by the person claiming to be aggrieved, where appropriate;

(3) A copy of the charge;

(4) The Commission's decision, determination, or dismissal, as appropriate.